Central Puget Sound Regional Transit Authority v. Eastey, et al., No. 55908-7-I

COX, J. (concurring) -- I agree that we must reverse and remand for a new trial. I write separately to focus on why the pre-trial ruling and the subsequent refusal of the trial judge to revisit that ruling are incorrect.

Parking Cure Ruling

The court's pre-trial ruling excluded evidence about the cost of reconfiguring the parking and remodeling the store so that customers could park and enter at the north end instead of the east side where they parked before the taking. The provision of the court's order at issue states:

> The Court finds and concludes that substantial parking along the East side of the subject parcel currently exists because of respondents' use of the right of way, which use is a privilege that may be revoked; and that respondent's access to the subject property will not be substantially restricted by the taking that is here at issue; therefore, it is hereby
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> ORDERED, ADJUDGED AND DECREED that respondents may not present to the jury evidence, inference or argument (i) for damages to parking allegedly flowing from loss of use of the right of way or ***(ii) for damages or costs of upgrading or remodeling the retail building to the extent that such upgrade/remodel is necessitated by any change that may be made to [the] current parking patterns.***[1]

As the majority correctly observes, the focus of the dispute is on part (ii) of this ruling, which prevented Eastey from putting on any evidence of remodeling costs made necessary by changing the ***"current parking patterns***."[2] The parties agree that vehicles parking in the existing stalls that are perpendicular to the east wall of the building must use the right-of-way for pulling in, backing up, and other

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[1] (Emphasis added.)
[2] Majority at 14-15.

maneuvers. They also agree Eastey will no longer be able to use this arrangement because his customers will no longer be able to use Transit's right-of-way. And Eastey's loss of the use of the right-of-way is not compensable.[3]

Eastey presented extensive evidence at the pre-trial hearing that, before the taking, angle parking for a reduced number of vehicles was possible on the east side of the building. He further argued that the angle parking would not have relied on MLK Way for parking maneuvers. A land use expert presented schematic drawings showing that parking could be realigned within the pre-taking property line in a configuration that would provide 28 parking spaces, most of them angled, on the east side of the building. According to that expert, loss of the condemned strip, though it was only three feet wide at most, was just enough to make the angled parking configuration impossible.

But the pretrial ruling erroneously excluded evidence of the cost of a parking cure as evidenced by the above presentation. Specifically, the order bars evidence of damages for "***any change"*** that may be made to the current parking patterns. Here, such evidence would have included the evidence that angled parking could have been accomplished without invading the adjacent right-of-way. Damages arising from this loss would not have been prohibited by controlling case law. In sum, the pre-trial ruling was overly broad in excluding evidence that would have supported Eastey's claim for just compensation for loss of the potential to use angled

[3] See Billington Builders Supply v. City of Yakima, 14 Wn. App. 674, 676-77, 544 P.2d 138 (1975) (owner of property abutting a public way had no property right in on-street parking); see also Showalter v. City of Cheney, 118 Wn. App. 543, 551, 76 P.3d 782 (2003) (no right to compensation for city-mandated removal of awning that had been allowed by license to rest on public sidewalk).

parking on the east side of the building.

A different judge tried the case, and Eastey sought relief from that judge on this issue. The judge declined, stating that the pre-trial ruling was the law of the case. The court did allow Eastey to submit the evidence as an offer of proof, and we have that evidence before us now on appeal.

The law of the case doctrine does not extend to this situation. In MGIC Fin. Corp. v. H.A. Briggs Co., Division II of this court rejected a similar argument.[4] There, one judge made a pre-trial ruling that denied the defendant's motion for summary judgment.[5] Several days later, on the same record, the trial judge granted the defendant's renewed motion for summary judgment.[6] In rejecting the argument that identical motions raised several times at the trial court level violated the law of the case doctrine, the court disagreed. The court stated that the doctrine generally applies only to parties who raise identical issues on successive appeals, not to identical issues raised several times before the trial court.[7]

Here, one judge made a pre-trial ruling in limine. The trial judge was entitled to reconsider that ruling. The law of the case doctrine did not prohibit reexamination of the matter.

Cox, J.

[4] 24 Wn. App. 1, 8, 600 P.2d 573 (1979).
[5] Id.
[6] Id.
[7] Id.